



## **Solutions for Post-Pandemic Debt Relief: Consumer and Small Business Bankruptcy Basics**

**March 9, 2021**

**5:30 p.m. – 7:30 p.m.**

**CT Bar Association**

**Webinar**

**CT Bar Institute, Inc.**

CT: 2.0 CLE Credits (General)

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## **LAWYERS' PRINCIPLES OF PROFESSIONALISM**

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

### **Civility:**

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

### **Honesty:**

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

### **Competency:**

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

### **Responsibility:**

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

**Mentoring:**

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

**Honor:**

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

**SOLUTIONS FOR POST-PANDEMIC DEBT RELIEF:**  
**CONSUMER AND SMALL BUSINESS BANKRUPTCY BASICS**  
**MARCH 9, 2021**

**AGENDA**

**5:30 p.m. (5 mins) – Introductions**

**5:35 p.m. (5 mins) – Bankruptcy Foundations**

(Judge Tancredi)

- Jurisdiction
- Venue
- Overview of common chapters

**5:40 p.m. (45 minutes) – Chapter 7 Basics**

(Kara Rescia)

- How a client qualifies
- Considerations for intake, common forms and questions
- Exemptions and how clients keep their personal property
- Role of the Chapter 7 Trustee
- Meeting of Creditors and creditor considerations
- Discharge and dischargeability
- Judicial lien avoidance and wage garnishments
- What the automatic stay and discharge injunction are and what they mean for a client

**6:25 p.m. – 5 minute break**

**6:30 p.m. (20 mins) – Chapter 13 Basics**

(Roberta Napolitano)

- How a client qualifies
- Differences from Chapter 7
- About a Chapter 13 plan and plan payments
- Duties of the debtor
- Role of the Chapter 13 Trustee

**6:50 p.m. (15 mins) – Subchapter V Brief Overview**

(Judge Tancredi)

- What the subchapter is used for
- Timeline of events
- Duties of the debtor
- Role of the Subchapter V Trustee

**7:05 p.m. (15 mins) – Bankruptcy Alternatives**

(All Speakers)

- Common alternatives to filing

**7:20 (10 mins) - Questions**

## **James J. Tancredi**

United States Bankruptcy Judge  
District of Connecticut- Hartford Division

James Tancredi was appointed to the United States Bankruptcy Court for the District of Connecticut by the U.S. Court of Appeals for the Second Circuit and took the oath of office on September 1, 2016. Prior to his appointment, he was a partner at the law firm of Day Pitney, LLP (f/k/a Day, Berry & Howard) where, as a business litigator and commercial restructuring lawyer, he co-founded the firm's regional and national bankruptcy practice. During his 37 years in private practice, he represented financial institutions and other major constituents in a broad range of prominent insolvency related proceedings pending in courts on the Amtrak corridor.



Judge Tancredi has a Bachelor of Arts degree in Urban Studies and Political Science from the College of the Holy Cross in Worcester, Massachusetts and received his law degree from the University of Connecticut School of Law. Each degree was awarded magna cum laude.

During his career, Judge Tancredi frequently lectured at the University of Connecticut School of Law and at bar association Continuing Legal Education programs on a broad range of commercial, real estate, and restructuring issues and strategies. His professional and bar association activities included service as president and director of the Hartford County Bar Association and the Connecticut Turnaround Management Association. He has been an active member of the Connecticut Bar Association, American Bar Association, American Trial Lawyers Association, and was a director of the Hartford County Bar Foundation and Connecticut Mental Health Association. He is also a Connecticut Bar Foundation James W. Cooper Fellow. These platforms provided invaluable opportunities for enhanced legal education and service to the bench and bar and served to drive local community pro bono initiatives.

He has written widely about business restructuring issues and co-authored the Connecticut chapter in “Strategic Alternatives for and Against Distressed Businesses”, 2016 Edition, published by Thomson Reuters West.

## Roberta Napolitano

Roberta Napolitano was a member of the panel of Chapter 7 Trustees for the District of Connecticut from May 1997 through September 1, 2017, when she became the Chapter 13 Standing Trustee for the District of Connecticut. She was a partner and associate at Ignal, Napolitano and Shapiro from October 1983 to September 1, 2018. Roberta is President of the Commercial Section of the Connecticut Bar Association, and Treasurer of the Connecticut Chapter of the International Women's Insolvency and Reorganization Confederation. She received her J.D. from the University of Connecticut School of Law in 1982, and her A.B. in 1979 from Bryn Mawr College.

## Kara S. Rescia

Kara S. Rescia is the principal of Rescia Law, P.C. with offices in Enfield, Connecticut and Northampton, Massachusetts, focusing on consumer and business bankruptcy and alternatives and small business representation. She is a 1988 graduate of the University of Southern Maine and a 1992 graduate of Western New England University School of Law. Since 1992, Attorney Rescia has concentrated her practice in bankruptcy, representing both debtors and creditors in business and consumer cases, as well as business and corporate law, including commercial financing and litigation. She is admitted to the bars for the Commonwealth of Massachusetts and the State of Connecticut and the U.S. District Court for the Districts of Massachusetts and Connecticut. Since 2010 and currently Attorney Rescia is a Chapter 7 panel trustee for the U.S. Bankruptcy Court, District of Connecticut. She also serves as a Sub V panel trustee and a Chapter 12 trustee for the U.S. Bankruptcy Court, District of Connecticut. Attorney Rescia is on the Executive Committee of the Connecticut Bar Association Commercial Law and Bankruptcy Section, a past Chair of the Bankruptcy Section of the Hampden County Bar Associations and is a member of the Massachusetts and Connecticut Bar Associations, the American Bankruptcy Institute, and the International Women's Insolvency Reorganization Confederation, New England and Connecticut Networks. She has been on the faculty of many seminars and has participated in numerous continuing legal education programs in the area of bankruptcy law.

**SOLUTIONS FOR POST-PANDEMIC DEBT RELIEF:**  
**CONSUMER AND SMALL BUSINESS BANKRUPTCY BASICS**

March 9, 2021

Written Materials By:  
Roberta Napolitano,  
Chapter 13 Standing Trustee

## **General**

### **I. Typical Types of Bankruptcy Cases: Chapters 7, 11 and 13**

#### **a. Chapter 7 – Liquidation**

- i. Chapter 7 is the liquidation or selling off of non-exempt property for payment to creditors from the proceeds.
- ii. The Debtor (or Debtors in the case of a joint petition by spouses) files a petition and schedules, an order for relief enters and an interim trustee from a panel of trustees is assigned to administer the case.
- iii. The Chapter 7 trustee is a disinterested attorney on a rotation panel of trustees whose primary duty is to locate and liquidate assets of the estate into cash and then to distribute the money to creditors in accordance with the priority scheme of the Bankruptcy Code.
- iv. The trustee reviews the schedules and examines the Debtor at the meeting of the creditors (341 meeting).
- v. Subject to the Debtor's rights to exempt certain assets after electing to take the bankruptcy or non-bankruptcy exemptions and rights of secured creditors in their collateral, the trustee collects and liquidates assets of the estate with equity and then distributes net cash according to priority scheme of the Bankruptcy Code.
- vi. In a no asset case (e.g. all assets of the estate are exempt or abandoned because of little or no equity), a discharge will enter within 60-90 days after the first meeting of creditors.
- vii. Where there are assets with equity that have not been exempted or when exemption is questioned, the first meeting of creditors is often continued by the trustee and the clerk's office of the bankruptcy court will not issue a discharge until creditors and/or the trustee may file objections to the discharge or to the dischargeability of their debt, or request extensions of time in which to do so.
- viii. Note, an involuntary bankruptcy case may also be commenced.

#### **b. Chapter 11 – "Reorganization"**

- i. Chapter 11 provides the opportunity to reorganize or readjust debts through a plan or contract with creditors. Creditors are allowed to vote on the plan and the plan must be approved by the Court. Individuals and most businesses can file a petition under Chapter 11.
- ii. Debtor files a petition and schedules and an order for relief enters.
- iii. The Debtor is examined under oath at the meeting of creditors by the U.S. Trustee's office every several months to monitor the status of the case.
- iv. Unless the case is converted or a trustee is appointed, the Debtor remains in control of the estate and is known as the debtor-in-possession, managing its operations and ultimately files a Disclosure Statement and Plan of Reorganization subject to court approval and confirmation.
- v. There is a four-month exclusivity period to file a plan.
- vi. Confirmation of the plan discharges a Debtor.

- vii. Lengthy delays, inability to provide adequate protection to secured creditors or to have a plan confirmed, gross mismanagement and other problems during the pendency of the case can result in a trustee or examiner being appointed or the conversion or dismissal of the case.
- c. Chapter 13 – Reorganization of Individual with Regular Income
  - i. Chapter 13 provides the opportunity to restructure debts through a payment plan which lasts between 3-5 years.
  - ii. Debtor files a petition and schedules and an order for relief enters.
  - iii. The Chapter 13 Trustee monitors, supervises and performs other administrative tasks. She ensures the plan is feasible and supported by Debtor's financial information and that the case is properly prosecuted.
  - iv. The Debtor remains in control and files a plan for confirmation.
  - v. A plan must be filed with the petition or within 14 days, or the Court will dismiss the case.
  - vi. Payments under a Chapter 13 plan starts the earlier of thirty days after the case is filed or a plan is filed. Section 1326(a)(1).
  - vii. Consummation of the plan discharges the Debtor.
  - viii. Like a Chapter 11 case, delays and other problems can lead to a conversion of the case to one under Chapter 7 or dismissal of the case.

## II. Bankruptcy Code and Bankruptcy Rules

- a. The Bankruptcy Code
  - i. 11 U.S.C. §§ 101 et seq. The Code consists of nine chapters.
    - 1. Chapter 1: contains provisions dealing generally with definitions, rules of construction and eligibility requirements for relief under the Code.
    - 2. Chapter 3: contains provisions dealing with the commencement of the case, filing fees, schedules, lists, statements to be filed, case administration, the bankruptcy estate and its officers, professionals, automatic stay, abstention, dismissal, conversion, adequate protection, assumption/rejection of executory contracts and unexpired leases, and certain administrative powers.
      - a. 11 U.S.C. § 362 – automatic stay
      - b. 11 U.S.C. § 348 – conversion
    - 3. Chapter 5: deals with creditor's rights, including the filing and allowance of claims, determination of secured status, claims to priority in payment, and the subordination of creditors. It also addresses avoiding powers, property of the estate, setoff, discharge, administrative expenses and tax liability. (Note: Except as provided in 11 U.S.C. § 103, Chapters 1, 3 and 5 apply to all other chapters of Title 11).
    - 4. Chapter 7: Liquidation.
    - 5. Chapter 11: Reorganization.
    - 6. Chapter 13: Reorganization of Individual.

b. The Bankruptcy Rules

- i. The Federal Rules of Bankruptcy Procedure (“FRBP”) set forth various types of procedures in a bankruptcy case necessary to obtain an order from a bankruptcy judge, or to obtain a result or conclusion within a case.
- ii. The Supreme Court revises the rules from time to time.
- iii. The rules cannot “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2075.
- iv. The rules must be read along with the relevant Bankruptcy Code provisions.
  1. (1001-1021) – commencement of the case, proceedings relating to the petition and order for relief.
  2. (2001-2020) – notice, meetings, examination, elections, attorneys and accountants.
  3. (3001-3022) – claims and distribution to creditors and equity interest holders, plans.
  4. (4001-4008) – Debtor’s duties and benefits.
  5. (5001-5012) – courts and clerks.
  6. (6001-6011) – collection and liquidation of the estate.
  7. (7001-7087) – proceedings in adversary proceedings – many rules incorporate similar rules in the Federal Rules of Civil Procedure.
  8. (8001-8028) – appellate procedure.
  9. (9001-9037) – general provisions, including those dealing with extensions of time, sanctions similar to Fed. R. Civ. P. 11, contempt, motions, contested matters and noncore procedure, transmittal of pleadings.
- v. In addition to the FRBP, there are Local Rules of Bankruptcy Procedure established by the bankruptcy judges in Connecticut.

III. Schedules, Means Testing and Credit Counseling

- a. Obtain client information (in writing) including:
  - i. Valuation of real property, lien balances, recorded liens, bank account balance, balance sheet for any business, recent tax returns, credit counseling certificate, paystubs, signed representation agreement.
- b. Inquire about certain matters:
  - i. Tax issues, past bankruptcies, tax refunds, claims against third parties (pending and/or that could be asserted), assets, trusts, interests in businesses, alimony or support arrearages, possible inheritances, transfers to third parties, repayments of loans to family members and friends, antiques/collections, cosigners, exemption issues and planning, timing issues.

- c. Discuss alternatives to bankruptcy:
  - i. Wait to see if problem is temporary, assess existing assets to help situation, evaluate settlement opportunities (settle with aggressive creditors), evaluate whether debtor is judgment proof, borrow money, debt repayment plans, Fair Debt Collection Practices Act issues, return collateral/short sale.
- d. Credit Counseling:
  - i. Law requires that before an individual file a bankruptcy case, the individual must:
    - 1. Receive a credit counseling briefing during the 180 days before filing the case, and
    - 2. File a credit counseling certificate from the agency with the petition.
  - ii. Only applies to individual debtors, applies to any Chapter, pre-bankruptcy filing requirement, certificate is good for 180 days, each Debtor must take course, usually takes 90 minutes or less, credit counseling agency must be approved by U.S. Trustee and can be obtained from their website.
  - iii. There is also a post-bankruptcy Debtor education financial management course requirement.
    - 1. Discharge will not enter without it.
    - 2. Requirements similar to credit counseling course.
    - 3. Agency providing Debtor education financial course must be approved by U.S. Trustee.

#### IV. About Bankruptcy Schedules

- a. Extensive compilation of detailed financial affairs, both past and present, of a Debtor.
- b. Must be prepared and reviewed carefully by Debtor – signed under penalty of perjury.
- c. Attorney should review carefully. Review assets, exemptions, responses, income and expenses for issues.
  - i. An attorney is considered “debt relief agency.” See 11 U.S.C. § 101(12A) and § 707(b)(3) for the definition and some of the added responsibilities which require “reasonable investigation into the circumstances that give rise to the petition, pleading or written motion.”
    - 1. Certain disclosures and notices required by the Debtors counsel. See 11 U.S.C. §§ 527-528.

2. Some straightforward requirements:
    - a. Disclose assets, liabilities, income and expenses.
    - b. There could be an audit.
    - c. Different chapters.
  3. Some not to straightforward requirements:
    - a. Within 5 business days after bankruptcy assistance is provided a written retainer contract is to be executed.
    - b. Disclose conspicuously in advertising that you are a debt relief agency and help people file for bankruptcy relief under the Bankruptcy Code.
- d. Look for:
- i. Real property
    1. Who owns real property – debtor or entity debtor controls?
      - a. 11 U.S.C. § 522 (b)(1) – “an *individual* debtor may exempt . . . “
      - b. Exemptions available only to natural persons “Under Connecticut law, exemptions-including the homestead exemption—‘afforded by General Statutes § 52–352a, apply only to ‘property of any natural person’.’ *Shawmut Bank, N.A. v. Valley Farms, et al.*, 222 Conn. 361, 366 (1992). The *Valley Farms* court stated that ‘[a]lthough the term ‘natural person’ is not defined ..., it clearly means a human being, *as opposed to an artificial or juristic entity.*” *Id.* In re Kochman, No. 11-50111, 2011 WL 5325792, at \*2 (Bankr. D. Conn. Nov. 3, 2011).
    2. Debtor need not inhabit entire property –
 

“Connecticut's homestead exemption statute does not require that a homestead be used exclusively as the debtor's residence, nor does it pro-rate the exemption if some portion of the property claimed as a homestead is utilized for other purposes.” In re Majewski, 362 B.R. 67, 70 (Bankr. D. Conn. 2007).
    3. Check for address on petition – PO Box? Check for mail, utility bills, voter registration, address on license, address on tax return.
  - ii. Check state court website for personal injury claims.
  - iii. Check Zillow for values.
  - iv. Check tax returns for interest, dividends, income not traceable to scheduled assets.
  - v. Check Schedule F for types of claims listed – if commercial, may lead to business.

- vi. Means Test Form –I can provide an Excel spreadsheet for detailed analysis, but the most fruitful inquiry is whether tax returns or other independent documents support household size.
  - 1. Only applies to individuals with primarily consumer debts.
  - 2. Set forth in 11 U.S.C. § 707(b)(2) for Chapter 7.
  - 3. Can be convoluted and complex different test for each Chapter.
  - 4. Complicated mathematical formula.
  - 5. Average of last 6 months of current monthly income less certain expenses (some capped, some unlimited, some not allowed) to determine if presumption of bankruptcy abuse arises.
  - 6. Uses household income.
  - 7. If household income is above the median for household of that size in your area, then more extensive questions must be answered on means test.
  - 8. Can rebut presumption, but sometimes difficult to show special circumstances.
  - 9. Can deduct, for example:
    - a. IRS standards for housing, transportation, food and clothing;
    - b. Reasonably necessary insurance;
    - c. Reasonably necessary housing and utility expenses that exceed national standards but proof required to determine that they are reasonably necessary;
    - d. Charitable contributions of up to 10% of gross income;
    - e. Actual secured debt;
    - f. Payments of priority debt (e.g. taxes); and
    - g. Actual education expenses up to \$1,500 per year per child.
- vii. Asset transfer – grounds for denial of discharge and counseling same is an ethical violation in Connecticut.

### **The Automatic Stay, 11 U.S.C. § 362**

#### **V. About the automatic stay**

- a. 11 U.S.C. § 362(a) of the Bankruptcy Code:
  - i. (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

1. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
2. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
3. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
4. any act to create, perfect, or enforce any lien against property of the estate;
5. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
6. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
7. the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
8. the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the Bankruptcy Court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

b. Termination of the Automatic Stay – 11 U.S.C. § 362(c)

- i. The various circumstances under which the automatic stay terminates, without need for a specific court order granting stay relief, are set forth in 11 U.S.C. § 362(c):
  1. With respect to actions against property of the estate (as opposed to actions against the Debtor (i.e. in rem actions)) stayed under 362(a), when the property is no longer property of the estate (11 U.S.C. § 362(c)(1)).
  2. With respect to actions against the Debtor (as opposed to actions against property), the stay continues until the earlier of:
    - a. the time the bankruptcy case is closed or dismissed (11 U.S.C. § 362(c)(2)(A) and (c)(2)(B)); or
    - b. the time discharge is granted (in all cases except non-individual Chapter 7 cases) (11 U.S.C. § 362(c)(2)(C)).

3. Secured creditors seeking to continue an action to recover against their collateral after discharge but before the bankruptcy case is closed or terminated need to determine whether the collateral remains an asset of the estate. Creditors should determine whether the Trustee has abandoned the asset (in accordance with 11 U.S.C. § 554) before proceeding against the collateral in reliance on 11 U.S.C. § 362(c)(1).
- ii. The Bankruptcy Code provides other circumstances under which the stay can be terminated or modified by order of the Bankruptcy Court. 11 U.S.C. § 362(d).
  1. Motions for relief from stay are commonplace where Debtor has no equity in property subject to a security interest and (in the case of Chapter 7 or 13), the property is not necessary for an effective reorganization.
  2. In cases where the stay terminates on account of entry of the discharge, creditors must understand that the stay is subsumed by the Discharge Injunction, which enters automatically (by operation of 11 U.S.C. § 524(a)).
- c. Serial filers and the Automatic Stay
  - i. 11 U.S.C. § 362(c)(3) – stay is in effect against property of the **DEBTOR** until case is closed, dismissed, or discharge is granted or denied but the stay is effective against property of the **ESTATE** until the property is no longer property of the estate 11 U.S.C. § 362(c)(1). Property is property of the estate until case is closed or dismissed. 11 U.S.C. §550 (c); 11 U.S.C. § 349(b)(3). However -
  - ii. 11 U.S.C. § 362(c)(3) of the Bankruptcy Code –
    1. (A) the stay expires “with respect to the debtor” 30 days after filing as to secured creditors if the Debtor re-files a case within a year of filing a prior Chapter 7, 11 or 13 and that case was dismissed. Court may re-impose stay but order must enter within 30 days of filing.
    2. (C) the stay expires with respect to all creditors if more than one case were pending within year preceding filing AND there has not been a substantial change in circumstances OR if the case was dismissed and a Motion for Relief was pending.
  - iii. “Finding the majority interpretation persuasive, I hold that section 362(c)(3) merely provides for a partial termination of the automatic stay. After thirty days, the stay terminates only with respect to the debtor and the debtor's property; the stay remains operative, however, with respect to estate property even after the thirty-day period expires.” In re Weil, No. 3:12CV462 SRU, 2013 WL 1798898, at \*4 (D. Conn. Apr. 29, 2013).

- iv. However – Stay expires as to property of ESTATE and “In sum, after following the guideposts the Supreme Court has planted, and reexamining this question with the benefit of over a decade of experience, scholarly study, and case law, this Court is persuaded the Minority Approach to interpreting the Controlling Statute is the most truly aligned with the congressional goal of deterring successive bankruptcy filings by an individual debtor and should be applied in this district. The Minority Approach meaningfully implements a deterrent to repeat filings by terminating the stay as to all creditors.” In re Goodrich, 587 B.R. 829, 847 (Bankr. D. Vt. 2018).
  - v. 11 U.S.C. §362(h) – automatic expiration of stay against personal property in individual cases expires 45 days after case is filed if not extended.
  - vi. 11 U.S.C. 109(g) – no refiling if Debtor voluntarily dismissed and motion for relief was filed.
  - vii. 11 U.S.C. § 362(c)(4)(A) if– two or more pending cases – a party in interest can request entry of an order confirming no stay is in effect AND (D) – presumption of bad faith filing.
- d. Other serial filer issues
- i. 11 U.S.C. § 109(g) of the Bankruptcy Code bars a Debtor from refiling within 180 days if the Debtor voluntarily dismisses after a motion for relief is filed.
  - ii. 11 U.S.C. §§ 105(a) and 349(a) of the Bankruptcy Code permit a Bankruptcy Court, in an appropriate case, to prohibit a serial filer from filing petitions for periods of time exceeding 180 days. In re Casse, 198 F.3d 327, 339 (2d Cir. 1999).
  - iii. A Debtor shows bad faith if the “sole and transparent purpose” of a bankruptcy is to “frustrate” foreclosure proceedings. In re Casse, 198 F.3d 327, 329 (2d Cir. 1999).
- e. Lien stripping
- i. 11 U.S.C. § 522(f) – available in Chapters 7, 11, 13 and only as to judicial liens.
  - ii. 11 U.S.C. § 506(a) – only Chapters 11 and 13 and in Chapter 13, can’t alter terms of claim secured by Debtor’s residence.
  - iii. A Debtor can’t cram down a car if it were purchased within 910 days of filing– 11 U.S.C. § 1325(a)(9).
  - iv. Defenses generally involve valuation but look at the exemptions, too

- v. Remember you have only 30 days from termination of meeting of creditors to object to exemption under FRBP Rule 4003(b), so make sure you've examined exemptions as soon as you can.
  
- f. Debtor and small businesses
  - i. Debtor must file MORs (monthly operating reports).
  - ii. Liquidation and valuation of small businesses
    - 1. Check operating agreements – most agreements provide for dissociation, not dissolution.
    - 2. Chapter 7 Trustee owns all stock, interest in wholly owned business and, if majority interest, can control business.
    - 3. If minority interest, Trustee will market and will likely find buyer whose specialty is purchasing interests and negotiating with co-owners.
    - 4. Dissociation in Connecticut if in a member-managed limited liability company, the person: (A) Becomes a Debtor in bankruptcy; Conn. Gen. Stat. Ann. § 34-263a.
    - 5. “ If a person is dissociated as a member: (1) The person's right to participate as a member in the management and conduct of the company's activities and affairs terminates; (2) if the company is member-managed, the person's duties and obligations under section 34-255h as a member end with regard to matters arising and events occurring after the person's dissociation; and (3) subject to section 34-259c and sections 34-279 to 34-279g, inclusive, or the Connecticut Entity Transactions Act, any transferable interest owned by the person in the person's capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee.” Conn. Gen. Stat. Ann. § 34-263b(a).
  
- g. Property of the estate
  - i. Inquiry must focus on relationship between asset and pre-petition past.
    - 1. Examples – commissions due real estate brokers, insurance agents, contingency fees due personal injury attorneys.
  - ii. Exemption of most property removes its value, not the property itself, from the estate. “As noted above, §§ 522(d)(5) and (6) define the ‘property claimed as exempt’ as an ‘interest’ in Reilly's business equipment, *not* as the equipment *per se*.” Schwab v. Reilly, 560 U.S. 770, 783, 130 S. Ct. 2652, 2662, 177 L. Ed. 2d 234 (2010).

## **The Bankruptcy Discharge and Dischargeability Issues**

### **VI. Exceptions to Discharge, Denial or Revocation of Discharge**

- a. Discharge Exceptions - 11 U.S.C. § 523 (Specific Debts Not Discharged)
  - i. Some types of debt are not subject to discharge in bankruptcy, even when the Debtor receives a general discharge. 11 U.S.C. § 523 sets forth 19 categories of debts that are not discharge in bankruptcy. Among the categories of non-dischargeable debts are:
    - 1. Tax obligations (subject to certain limitations) (11 U.S.C. § 523(a)(1), (a)(14) and (a)(14a));
    - 2. Debts that are unlisted/unscheduled in Debtor's schedules (11 U.S.C. § 523(a)(3));
    - 3. Alimony and child support (11 U.S.C. § 523(a)(5));
    - 4. Government fines and penalties (as distinguished from compensation for pecuniary loss), subject to certain limitations in the statute (11 U.S.C. § 523(a)(7));
    - 5. Liability for death or personal injury caused by Debtor's operation of automobile or vessel while intoxicated (11 U.S.C. § 523(a)(9));
    - 6. Loan from retirement fund (11 U.S.C. § 523(a)(18)); and
    - 7. Violation of Securities Laws (11 U.S.C. § 523(a)(19)).
  - ii. Litigation under 11 U.S.C. § 523(a)(2), (4) and (6)
    - 1. These exceptions are the most common statutory basis for debt discharge litigation brought by unhappy creditors:
      - a. 11 U.S.C. § 523(a)(2): Debts for money, property or services provided to Debtor, to the extent obtained by fraud or false pretenses or by use of a false written statement of Debtors financial condition.
        - i. Certain consumer debts for purchase of luxury goods, and cash advances, presumed non-dischargeable (See 11 U.S.C. § 523(a)(2)(C)).
        - ii. If Creditor brings 523(a)(2) non-discharge proceeding for a consumer debt and loses the action, the creditor may be held liable for the Debtor's attorney's fees if the Court finds such award warranted. See 11 U.S.C. § 523(d).
        - iii. Burden of proof is on the creditor. However, even if creditor is alleging fraud (11 U.S.C. § 523(a)(2)), applicable standard is not clear and convincing, as would be the case in a civil action outside the bankruptcy context, but preponderance of the Evidence, which is the applicable standard for all bankruptcy matters. Grogen v. Garner, 498 U.S. 279 (1991).

- b. 11 U.S.C. § 523(a)(4): Debts for Debtor’s fraud or defalcation while acting in a fiduciary capacity, and for embezzlement or larceny.
    - c. 11 U.S.C. § 523(a)(6): Debts for a willful or malicious injury by the Debtor. Debtor fired five shots at victim – two in the air, one in the ground and two that hit victim in the arm. Debtor claimed his conduct was neither reckless nor malicious. In re Arguello, No. 17-80324, 2018 WL 6720772, at \*1 (Bankr. S.D. Tex. Dec. 20, 2018).
  - iii. Who has standing to bring litigation under 11 U.S.C. § 523?
    - 1. The Debtor or any creditor (Rule 4004(a)).
  - iv. How litigated
    - 1. When non-discharge is based on 11 U.S.C. § 523(a)(2), (a)(4) or (a)(6), discharge of such debt will be denied only upon the Court’s determination that such debt is non-dischargeable (11 U.S.C. § 523(c)(1)). Such a proceeding requires the initiation of an adversary proceeding (Rule 7001(6)). With limited exception, non-discharge of the other types of debts listed in 11 U.S.C. § 523(a) requires no court determination and is essentially automatic.
  - v. When A 11 U.S.C. § 523(c) Action Must Be Commenced
    - 1. Not later than 60 days after the First date set for the 11 U.S.C. § 341(a) Creditors Meeting. Rule 4007(c).
    - 2. Creditors are entitled to at least 30 days’ notice of the deadline. On motion of a party in interest, the 60 day deadline may be extended.
  - vi. Government Guaranteed/Funded Student Loan Debt
    - 1. These types of student loans are automatically excepted from discharge (11 U.S.C. § 523(a)(8)). However, guaranteed student loan debt can be discharged if the Debtor demonstrates that non-discharge of the debt results in “undue hardship” on Debtor and his or her dependents (11 U.S.C. § 523(a)(8)). A Debtor must initiate an adversary proceeding against the entity holding the student loan in order to obtain a hardship discharge (Rule 7001(6)).
  - vii. In Chapter 13
    - 1. In Chapter 13 cases, the 11 U.S.C. § 523(a) exceptions apply when a Chapter 13 Debtor receives a discharge despite having failed to complete payments under the confirmed Chapter 13 plan as permitted under 1328(b). However, when a Chapter 13 Debtor completes payments under the Chapter 13 plan, the scope of exceptions to discharge is more limited:
      - a. Certain tax obligations (of the kind specified in 11 U.S.C. § 507(a)(8)(C), and 523(a)(1)(B) and (a)(1)(C).
      - b. Unscheduled and unlisted debts.
      - c. Debts incurred by fraud or breach of fiduciary duty (of the kind specified in 11 U.S.C. § 523(a)(2) and (a)(4).
      - d. Alimony and child support – property division claims are dischargeable.

- e. Guaranteed Student Loans (subject to undue hardship exception).
  - f. Liability for death or personal injury caused by Debtor's operation of automobile or vessel while intoxicated.
  - g. Post-petition consumer debts not approved by the trustee before being incurred.
- b. Denial of Bankruptcy Discharge Generally
  - i. In certain circumstances, a Debtor can be denied a bankruptcy discharge altogether - in which case no prepetition debts are discharged.
  - ii. In Chapter 7 Cases
    - 1. 11 U.S.C. § 727(a) sets forth 12 separate circumstances where a Chapter 7 Debtor may be denied a discharge. Among the 12 reasons:
      - a. Debtor has transferred or concealed assets within 1 year preceding bankruptcy, with intent to hinder, delay or defraud creditors (11 U.S.C. § 727(a)(2));
      - b. Debtor's spoliation of relevant evidence related to Debtor's financial condition or business affairs (11 U.S.C. § 727(a)(3));
      - c. Debtor has provided false information in connection with the bankruptcy case or has withheld necessary information from the trustee (such as books and records) (11 U.S.C. § 727(a)(4));
      - d. Debtor's refusal to obey court orders or to provide testamentary evidence (11 U.S.C. § 727(a)(6));
      - e. Debtor previously granted a bankruptcy discharge in a Chapter 7 or Chapter 11 case filed within 8 years of the filing of the instant bankruptcy case (11 U.S.C. § 727(a)(8)); and
      - f. Debtor previously granted a bankruptcy discharge in a Chapter 13 case filed within 6 years of the filing of the instant bankruptcy case (11 U.S.C. § 727(a)(9)) unless Debtor paid 100%/70% of general unsecured claims.
    - 2. How 11 U.S.C. § 727(a) Discharge Exceptions Determined:
      - a. Proceedings to object to discharge or revoke discharge under 11 U.S.C. § 727(a) are brought by adversary proceeding, except for discharge based on Debtor's prior discharge (11 U.S.C. § 727(a)(8) and 9)), which may be brought by motion objecting to discharge (Rule 7001(4)).
    - 3. Who can seek denial of the discharge under 11 U.S.C. § 727(a)?
      - a. The Chapter 7 Trustee, The United States Trustee, or a Creditor may seek denial of discharge (11 U.S.C. § 727(c)).
    - 4. When must a 11 U.S.C. § 727(a) proceeding be brought?
      - a. 60 days after the FIRST date set for the 11 U.S.C. § 341 creditors meeting (Rule 4004(a); 4007(c)).

- b. This date may be extended for cause - Debtor will often stipulate to the extension (Rule 4004(b)).

## **Avoidance Litigation**

### VII. Avoidance Litigation in Bankruptcy

#### a. Bankruptcy Code Chapter 5 Avoidance Tools

- i. Preferential Transfers
- ii. Fraudulent Conveyances
- iii. Trustee's "Strong-Arm" Avoidance Powers
- iv. Unauthorized Post-Petition Transfers

#### b. General

##### i. Who can bring avoidance action?

- 1. The Trustee (in a Chapter 11 case that would be the Debtor unless a Chapter 11 trustee has been appointed) (11 U.S.C. § 550(a)). In Chapter 11 cases, we have seen the authority delegated to Official Committee of Unsecured Creditors - requires a court order. It might also be the Debtor in a Chapter 13 case. "Inasmuch as Olick's activities before the district court did not involve any attempt to assert the trustee's avoiding powers, see 11 U.S.C. §§ 544–53, we need not consider, and deliberately express no opinion regarding, whether a Chapter 13 Debtor would be able to invoke those powers in an action to augment the bankruptcy estate." Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 516 (2d Cir. 1998).

##### ii. How are Chapter 5 Avoidance Actions Determined?

- 1. As proceedings to recover money or property, avoidance litigation requires commencement of an adversary proceeding (Bankruptcy Rule 7001(1)). A defendant that has not otherwise subjected itself to the jurisdiction of the Bankruptcy Court may have the right to trial by jury, though jury trials in Chapter 5 litigation is extremely rare.

##### iii. Who is liable for avoidable transfers?

- 1. The initial transferee. 11 U.S.C. § 550(a);
- 2. The immediate or mediate transferee of the initial transferee unless such immediate or mediate transferee takes for value provided, in good faith, and without knowledge of the voidability of the transfer (11 U.S.C. § 550(a)).

##### iv. What is the Statute of Limitations to bring an Avoidance Action?

- 1. Statute of limitations is 11 U.S.C. § 546(a). These actions must be brought by the later of:
  - a. 2 years entry of the order for relief (i.e. the bankruptcy petition date); or

- b. 1 year after the appointment of a bankruptcy trustee.
- c. Avoidance of Preferential Payments – 11 U.S.C. § 547
  - i. Trustee can bring action to avoid “preferential” payments made by Debtor prior to the Petition Date. 11 U.S.C. § 547(b). The Look back periods for avoidable preferences are:
    - 1. For payments to non-insider creditors, 90 days prior to the Petition Date.
    - 2. For payments to insider creditors, 1 year prior to the Petition Date.
  - ii. Elements of Avoidable Preference Cause of Action
    - 1. The payment was made to or for the benefit of a creditor;
    - 2. The payment was on account of an antecedent debt (i.e., the debt was owed before the payment was made);
    - 3. The payment was made while the Debtor was insolvent; and
    - 4. The payment enabled the creditor to receive more than it would receive if the case were Chapter 7 and the payment had not been made.
  - iii. Defenses
    - 1. 11 U.S.C. § 547 provides a number of affirmative defenses to an otherwise avoidable preference. Of those defenses, those most often litigated are:
      - a. The payment was, and was intended to be, a contemporaneous exchange for new value. 11 U.S.C. § 547(c)(1).
      - b. The payment was made in the ordinary course of business between the Debtor and the creditor, or made in accordance with ordinary business terms (industry standard). 11 U.S.C. § 547(c)(2).
    - 2. The creditor provided new value to Debtor after the payment. 11 U.S.C. § 547(c)(4).
  - iv. Payments to Secured Creditors
    - 1. Payments made to a creditor that has a valid, perfected security interest in Debtor’s assets are typically safe (at least to the extent the creditor is not undersecured) from avoidance because the payment, being secured, did not enable the creditor to receive “more” than it would have received in a Chapter 7 liquidation and the payment had not been made.
- d. Fraudulent Conveyance Actions – 11 U.S.C. § 548
  - i. Trustee can bring action to avoid transfers of the interest of Debtor in property within 2 years of the petition date where:
    - 1. The payment was made with actual intent to hinder or delay or defraud a creditor (11 U.S.C. § 548(a)(1)(A);
    - 2. The Debtor received less than reasonably equivalent value in exchange for such transfer (11 U.S.C. § 548(a)(1)(B). Certain

other conditions that must be satisfied to avoid a transfer under 11 U.S.C. § 548(a)(1)(B);

3. Debtor was insolvent when the transfer in issue was made, or became insolvent because of such payment;
4. Debtor was under capitalized for the business it was transacting; or
5. Debtor intended to incur debts beyond its ability to pay such debts as they matured; or
6. Debtor made the transfer to the benefit of an insider under an employment contract and outside the ordinary course.

e. Trustee's Strong-Arm Avoidance Power – 11 U.S.C. § 544

- i. Pursuant to 11 U.S.C. § 544, the Trustee has the avoidance powers of a hypothetical lien creditor as of the Petition Date as provided under applicable non-bankruptcy law. This essentially means that state laws granting creditors the power to avoid transfers of a Debtor's interests in property are available to a bankruptcy trustee. Such actions are not limited to the look back period of 11 U.S.C. § 548 – the look back period of the applicable non-bankruptcy law applies.
- ii. In Connecticut, a Trustee may have standing under 11 U.S.C. § 544 to invoke the Connecticut Uniform Fraudulent Transfer Act., C.G.S. § 52-552 to avoid fraudulent transfers. The look-back period under the Connecticut act is four years for some types of transfers. However, under the Connecticut law, a UFTA plaintiff must be an actual creditor before the transfer to be avoided was made. Thus, to have standing under Section 544 to invoke UFTA, a Trustee must that there was at least one creditor whose claim existed before the Debtor made the transfer in question. The statute might be 10 years if the IRS is a creditor. "In sum, this Court agrees with *Kaiser* and the majority of decisions that the language in § 544(b) is clear and allows the Trustee in this case to step into the shoes of the IRS to take advantage of the ten-year collection period in 26 U.S.C. § 6502." *In re Kipnis*, 555 B.R. 877, 883 (Bankr. S.D. Fla. 2016).
- iii. In New York, Trustees frequently invoke New York Debtor and Creditor Law 270-281.

f. Unauthorized Post-Petition Transfers

VIII. Disparate Treatment of Student Loans in Chapter 13

A. Overview:

- a. Between 2001 and 2016, the real amount of student loan debt owed by American households more than tripled.  
[www.federalreserve.gov/econres/notesfednotes/studen-loan-debt-and-aggregate-consumption-growth-20180221.htm](http://www.federalreserve.gov/econres/notesfednotes/studen-loan-debt-and-aggregate-consumption-growth-20180221.htm). In June 2018, approximately \$1.41 trillion in student loan debt was outstanding. Of that amount, approximately 10.9% was more than ninety days past due, and even that figure may be understated because so many loans are in deferment. The

actual figure may be twice as high. See [www.newyorkfed.org/media/library/interactives/household credit/data/pdf/HHDC\\_2018Q2.pdf](http://www.newyorkfed.org/media/library/interactives/household%20credit/data/pdf/HHDC_2018Q2.pdf).

- b. According to the website [studentloans.gov](http://studentloans.gov) there are four types of federal student loans – Direct Subsidized Loans, Direct Unsubsidized Loans, Direct PLUS Loans, and Direct Consolidation Loans. [https://studentloans.gov/myDirectLoan/entrance counseling.action?execution+els1](https://studentloans.gov/myDirectLoan/entrance%20counseling.action?execution+els1). Also according to the website, the federal government pays interest on most direct subsidized loans while they are in deferment (when the student is in school, for six months afterwards, and for certain other periods - the site is silent regarding the bankruptcy deferment referenced in ECF 44.) It also appears from the website that interest on all direct subsidized loans on all other loans, regardless of deferment, is capitalized, or added to the principal, during all periods of nonpayment or deferral.

#### B. Student Loans in Chapter 13 Bankruptcy Proceedings

- a. Non Dischargeable Debts not afforded Priority: The Bankruptcy Code does not afford a debt priority simply because it is non-dischargeable. *In re Bentley*, 266 B.R. 229, 241 (B.A.P. 1st Cir. 2001). It is interesting that one of the most frequently cited cases on the student loan issue is *In re Leser*, 939 F.2d 669 (8th Cir. 1991), which allowed favorable treatment of a child support obligation, on which Congress later conferred super-priority under BAPCPA.
- b. Student Loan Debt only desirable behavior excepted from discharge. Section 523(a)(8) of the Bankruptcy Code excepts from discharge an educational benefit loan made, insured, guaranteed or funded by a governmental unit or nonprofit institution, or an obligation to repay funds received as an educational benefit, scholarship or stipend. Some courts argue that incurring a student loan is the only socially positive behavior denied a discharge under Section 523. The rationale for including every other nondischargeable debt in Section 523 is to punish undesirable conduct or curtail rewards for “socially undesirable behaviors.” Student loan debt is the only non-dischargeable debt incurred for a “socially beneficial purpose.” *In re Engen*, 561 B.R. 523, 540-541 (Bankr. D. Kan. 2016).
- c. Budget balancing purposes of making student loan debt non-dischargeable. Student loan debt has so permeated the American economy that while its original inclusion in Section 523 arose from attempt in 1978 to “curb the abuses” of the educational loan system,” the expansion of non-dischargeable debt occurred in a budget balancing act. *In re McFadyen*, 192 B.R. 328, 331 (Bankr. N.D.N.Y. 1995), citing *In re Pilcher*, 149 B.R. 595, 598 (9th Cir. BAP 1993), citing 124 Cong.Reg.1791–94 (1978); see also *In re Pelkowski*, 990 F.2d 737, 742–43 (3d Cir.1993); *Engen* at 544.
- d. Disparate Treatment in Plan: Debtors in Chapter 13 have attempted to ease the burden of repaying student loans by placing them in a separate class from other unsecured debt, and paying them in lieu of, or at more favorable proportions, than other non-priority unsecured debt. Few courts have confirmed plans with disparate treatment, and the bar for that approval is high.

- e. What Constitutes Unfair Discrimination under Chapter 13 of the Bankruptcy Code: Section 1322(b)(1) allows a Debtor in Chapter 13 to designate a class or classes of unsecured claims, but prohibits “unfair” discrimination against any class so designated. There is no definition of unfair discrimination in this circuit, and we are not alone. “Discriminate” in this context has no pejorative connotation, but means treating “two things differently on account of a distinction between them.” *Bentley* at 237. The meaning of “unfair discrimination” has presented much more difficulty. “One early court, after observing that decisions on the issue of what constituted ‘unfair’ discrimination ran the ‘gamut from everything goes to nothing is allowed,’ was led to conclude that ‘somewhere between total whim and an Act of God lies the answer to what justification is needed to hew out a particular class of unsecured creditors and distinguish it from other unsecured creditors.’ *In re Hill*, 4 B.R. 694, 697–698 (Bankr.D.Kan.1980).” *In re Orawsky*, 387 B.R. 128, 141 (Bankr. E.D. Pa. 2008).
- f. Failure to allocate pro rata need not be unfair: An allocation among claims in the same class need not be “pro rata” to be fair. Mandating *pro rata* distribution in every situation is contrary to Section 1322(b)(1)’s express authorization for **separate** classification. *Orawsky* at 146. Relying on the public interest in promoting the solvency of educational loan programs, the *Orawsky* Court confirmed a plan which provided for payments of \$100.00 a month to the trustee for the benefit of non-student loan unsecured creditors and payments of \$217.00 a month by the debtor for student loan debt. Because the debtor was below median, the Court characterized her payments as “voluntary.” *Orawsky* at 148.
- g. *Baseline or Bentley Test*: The Court in *Bentley* found the examination of fairness involves three parties – the debtor, the preferred class, and the class discriminated against. *Bentley* at 239. *Pro rata* treatment of the General Unsecured Class would provide a substantial dividend. Whether the treatment was unfair involved the following considerations:
  - i. Equality of distribution – unless the Code confers priority, unsecured creditors should share equally in any dividend. The burden of justification is on those who propose plans to the contrary. *Bentley* at 240.
  - ii. Non-priority of student loans- a debt doesn’t acquire priority just because it can’t be discharged, and nothing in the Code suggests student loans should be treated more favorably *Bentley* at 241.
  - iii. Contributions- mandatory v. voluntary. The above median debtors in *Bentley* proposed to pay only the sum required by their Means Test, and that sum only to their student loan creditors. The Court found this unfairly enhanced the position of the student loan creditors, who are in a better position than that of general unsecured creditors because they are assured of payments after the plan is consummated because of the nondischargeability of their debts. *Bentley* at 242-3.
  - iv. A fresh start doesn’t mean a debtor will emerge completely free of student loan obligations. *Bentley* at 242.

- h. *Engen*: The Bankruptcy Court for the District of Kansas loosely applied the *Bentley Baseline Test*. It referred to the prevalence of “first day” orders which disturb the priority of the Code in Chapter 11. *Engen* at 535. It found the Congressional intent in making student loans nondischargeable was the preservation of the government’s fiscal health as guarantor or lender of these loans; therefore, it would further a legitimate public policy to favor them. The amendment making loans nondischargeable came as part of a federal budget balancing package which suggests its purpose was to serve a societal interest in maximizing payments. *Engen* at 541-7. The Court allowed discrimination in *Engen*, but relied on two factors absent here. The debtors, prepetition, participated in a Debt Management Plan (“DMP”) and paid down approximately 83% of their general unsecured debt. Participation in the DMP caused the debtors to default on their mortgages, and incur priority tax debt of about \$25,000.00. The debtor was a co-borrower for her son on one treated loan. *Engen* at 526.
- i. *Mason Test*: The Court in *In re Mason*, 300 B.R. 379 (Bankr. D. Kan. 2003), applied a hybrid of *Leser*, *Bentley*, and the test in *In re Colfer*, 159 B.R. 602 (Bankr. D. Me. 1993). It found the debtors benefited only “marginally” from a reduction from 93 percent of student loan debt remaining unpaid with discrimination, compared to 83 percent remaining with discrimination. In another *Mason* case, the Court stated it might allow discrimination had the debtor articulated a reason for the discrimination. *In re Mason*, 456 B.R. 245, 252 (Bankr. N.D.W. Va. 2011). “For example, if the 72% distribution will prevent the unwarranted accrual of interest and/or penalties during the term of the Chapter 13 plan, the court is likely to find the discrimination acceptable. *Mason* (WV) at 253, ft. 8. The damage to unsecured creditors in this case offsets the minimal accrual of interest.
- j. *The Second Circuit on “unfair” discrimination*: Two cases in the Second Circuit considered what might make discrimination “unfair.” The Court in *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233 (Bankr. S.D.N.Y. 2014), a case under Chapter 11, found the plan proponent must show 1) there is a reasonable basis for discriminating, 2) the debtor cannot consummate the plan without the discrimination, 3) the discrimination is proposed in good faith, and 4) the degree of discrimination is in direct proportion to its rationale. *Genco* at 242. The Debtor can show she is acting in good faith and that there is a reasonable basis for discrimination, but the Trustee does not believe the degree of discrimination is in direct proportion to her rationale. The massive student loan burdens affecting other debtors in this district may have warped the Trustee’s perspective, but it does not appear fair to allow the Debtor to ignore other unsecured claims in favor of allowing her to reduce the balance on a student loan. The second prong of the *Genco* test appears inapplicable. Another court in the Second Circuit propounded a similar test in *In re Strausser*, 206 B.R. 58 (Bankr. W.D.N.Y. 1997) in determining whether a debtor under Chapter 13 unfairly discriminated in proposing to pay a single cosigned consumer debt in full and only five percent of the claims of the remaining unsecured creditors. The *Strausser* Court found the debtor needed

to show 1) there was a rational basis for discriminating, 2) the classification was necessary to the debtor's rehabilitation under Chapter 13, 3) the discrimination is proposed in good faith, and 4) there was a meaningful payment to the class discriminated against and 5) the difference between what the discriminated class would receive if there were no discrimination. The Debtor satisfies prongs 1 and 3 of the *Strausser* test. There is a reasonable basis for the discrimination, and she proposes the discrimination in good faith. If the Debtor paid general unsecured claims *pro rata*, the principal on the Student Loan claim will remain close to the same; the Debtor will have cured the mortgage and tax arrearages on her property, and she will receive a fresh start. She proposes no meaningful payment to the General Unsecured Class, which will receive substantially less than it would receive if there were treated *pro rata* with the Student Loan Claim.

# Solutions for Post-Pandemic Debt Relief: Consumer and Small Business Bankruptcy Basics

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# JURISDICTION

- ▶ Title 11 of the United States Code contains the Bankruptcy Code
- ▶ 28 U.S.C. § 1334 gives federal district courts subject matter jurisdiction over cases filed under Title 11
- ▶ 28 U.S.C. § 157(a) refers bankruptcy matters from the district courts to bankruptcy courts
- ▶ 28 U.S.C. § 157(b)(1) sets forth “core proceedings” which fall under the jurisdiction of bankruptcy courts
- ▶ Bankruptcy courts may also hear “non-core” matters related to a bankruptcy proceeding, but may not render a binding decision and instead submits findings and conclusions to the district court for review to render a decision

# VENUE

- ▶ 28 U.S.C. § 1408 sets forth factors for determining proper venue
  1. The district where the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 180 day before commencement or where located for a longer portion of such 180 day period than any other district
  2. The district where a case under Title 11 concerning a person's affiliate, general partner, or partnership is pending.
- ▶ Local Bankruptcy Rule 1073-1 determines based on county which of the three Connecticut divisions – Hartford, Bridgeport, or New Haven – a case should be filed in

## COMMON CHAPTERS

- ▶ Chapter 7 – Consumer liquidation
- ▶ Chapter 9 – Municipal reorganization
- ▶ Chapter 11 – Business reorganization
  - ▶ Subchapter V – Small business reorganization
- ▶ Chapter 12 – Farmer and fishermen reorganization
- ▶ Chapter 13 – Consumer reorganization
- ▶ This presentation will focus on Chapters 7, 13, and Subchapter V of Chapter 11, as well as touch on some alternatives to bankruptcy.

## CHAPTER 7 – CONSUMER LIQUIDATION

### HOW YOUR CLIENT QUALIFIES

- ▶ Must not have received a discharge in any other bankruptcy case in the last 8 years from the date of filing of the prior Chapter 7 case
- ▶ Must be under the gross median income for their household size for their state
  - ▶ Income is based on a 6 month lookback period, which is annualized in a calculation called the “means test”
  - ▶ The means test was established to police abuse of the bankruptcy system, but it can be prejudicial in some cases
  - ▶ If a client is over the median income, certain deductions can be made to adjust the amount of excess income down and some clients may qualify based on those deductions
  - ▶ The current median income tables and information on deductions can be found here: <https://www.justice.gov/ust/means-testing/20201101>

## CHAPTER 7 - CONSUMER LIQUIDATION BEFORE YOU FILE

- ▶ Initial consults should be robust fact-finding missions to determine whether the client qualifies, what assets you will need to exempt, and the nature of the debts
  - ▶ Question topics should include, but not be limited to:
    - ▶ Marital and custody status, including divorce obligations
    - ▶ Interests in real property, including time shares
    - ▶ Interests in businesses, including self-employment
    - ▶ Beneficiary interests, such as in trusts, life insurance, or other inheritance
    - ▶ Personal property of value, such as firearm or coin collections, antiques, or jewelry
    - ▶ Amounts owed to the client, such as loans or tax refunds
    - ▶ Claims the client may bring against third parties, such as workers compensation or personal injury

## CHAPTER 7 – CONSUMER LIQUIDATION

### BEFORE YOU FILE CONT.

- ▶ All debtors must complete a pre-filing credit and a post-filing credit counseling course administered by a company approved in the filing jurisdiction
  - ▶ More information can be found here: <https://www.justice.gov/ust/credit-counseling-debtor-education-information>
  - ▶ A list of companies approved in Connecticut can be found here: [https://www.justice.gov/ust/eo/bapcpa/ccde/CC\\_Files/CC\\_Approved\\_Agencies\\_HTML/cc\\_connecticut/cc\\_connecticut.htm](https://www.justice.gov/ust/eo/bapcpa/ccde/CC_Files/CC_Approved_Agencies_HTML/cc_connecticut/cc_connecticut.htm)
- ▶ Official bankruptcy forms for filing can be found here: <https://www.uscourts.gov/services-forms/forms?k=&c=67>
- ▶ Instructions on how to complete forms can be found here: [https://www.uscourts.gov/sites/default/files/instructions\\_individuals.pdf](https://www.uscourts.gov/sites/default/files/instructions_individuals.pdf)
- ▶ The current filing fee for a Chapter 7 is \$338.
  - ▶ Current filing fees can be found here: <https://www.ctb.uscourts.gov/fees-0>

# CHAPTER 7 – CONSUMER LIQUIDATION

## EXEMPTIONS – HOW CLIENTS KEEP THEIR PROPERTY

- ▶ 11 U.S.C. § 522(3)(A) sets forth formula for determining which state's exemption laws govern
  - ▶ Debtor's domicile 730 days preceding filing or if not one place, the place of domicile in the 180 days preceding the 730 days or the longer portion of such 180 day period than anywhere else
- ▶ Not all states allow debtors to take federal exemptions, called opt-out states
  - ▶ Be aware of the hanging paragraph – if (A) renders debtor ineligible for any exemption scheme, they may take federal exemptions
- ▶ In Connecticut, debtors may choose from state or federal exemptions depending on the type of property they need to exempt
- ▶ 11 U.S.C. § 522(d) contains federal exemption scheme
  - ▶ Typically used when there is little or no equity in real estate
  - ▶ Generous “wildcard”
- ▶ Conn. Gen. Stats. §§ 52-352b, 38a-453 contain the majority of Connecticut's exemptions

# CHAPTER 7 – CONSUMER LIQUIDATION

## ROLE OF THE TRUSTEE

- ▶ A bankruptcy estate is automatically created when a case is filed. What is property of the bankruptcy estate is typically determined as of the date of filing – 11 U.S.C. § 541
- ▶ A trustee is appointed in every Chapter 7 case to administer the estate
  - ▶ Trustees are selected from a panel of disinterested persons, typically attorneys
  - ▶ Debtors have a duty to cooperate with the trustee, including to provide requested documentation
- ▶ The trustee's job is to find and liquidate non-exempt assets for the benefit of creditors of the bankruptcy estate
  - ▶ Beware the undisclosed asset
  - ▶ Beware the preference period – 11 U.S.C. § 547
  - ▶ Beware the fraudulent transfer – 11 U.S.C. § 548
  - ▶ Beware the post-petition transfer – 11 U.S.C. § 549

# CHAPTER 7 – CONSUMER LIQUIDATION

## SECTION 341 MEETING OF CREDITORS

- ▶ Approximately 1-1.5 months after a case is filed
- ▶ Hearing under oath in front of the appointed trustee
  - ▶ Debtor testifies about assets, income, and debts – all documents are also signed under penalty of federal perjury
  - ▶ Allows a trustee to discover pursuable assets and claims
- ▶ Under 11 U.S.C. § 521(e)(2), 7 days before the Meeting of Creditors, the debtor must provide the trustee with their complete last filed tax return and 60 days of paystubs, as well as additional requested information
- ▶ All creditors receive notice of the bankruptcy filing and may attend the Meeting of Creditors to question a debtor about a debt
- ▶ Creditors have 60 days after the first Meeting of Creditors to make a claim of fraud or misrepresentation against the debtor

## CHAPTER 7 – CONSUMER LIQUIDATION

### DISCHARGE & DISCHARGEABILITY

- ▶ If no creditor makes a claim against the debtor, the debtor will receive a discharge of all dischargeable debts – except that a corporation cannot receive a discharge
- ▶ If a creditor makes a claim against the debtor, the debtor may not receive a discharge of the creditor's debt only under 11 U.S.C. § 523 or any debt under 11 U.S.C. § 727
- ▶ Some debts are not dischargeable by nature, including:
  - ▶ Domestic support obligations
  - ▶ Criminal restitution
  - ▶ Student loans
  - ▶ Certain tax debts
  - ▶ Although secured debts may be dischargeable, the note securing the debt is not

## CHAPTER 7 – CONSUMER LIQUIDATION

### JUDICAL LIEN AVOIDANCE & WAGE GARNISHMENTS

- ▶ A debtor may avoid a judicial lien recorded against their real property pursuant to 11 U.S.C. § 522(f) by motion
  - ▶ Formula to calculate whether the lien impairs the debtor's exemption in the property
    - ▶  $\text{Liens} + \text{Exemption} = \text{Subtotal}$   
 $\text{Subtotal} - \text{Value of Debtor's Interest} = \text{Amount of Impairment}$
- ▶ A debtor may seek return of involuntarily garnished wages during the 90 days before filing pursuant to 11 U.S.C. § 522(g) by demand

## CHAPTER 7 – CONSUMER LIQUIDATION

### AUTOMATIC STAY & DISCHARGE INJUNCTION

- ▶ When a case is filed, an automatic stay is put in place
  - ▶ Prevents creditors from attempting to collect a debt
  - ▶ Secured creditors may move for relief from the automatic stay to collect their collateral, such as in repossession or foreclosure
  - ▶ Creditors who violate the stay may be subject to sanctions
  - ▶ Beware – mortgage lenders, auto lenders may terminate online access or automatic payments for debtors during the bankruptcy for fear of the stay
- ▶ After a debtor receives their discharge, a discharge injunction is put in place
  - ▶ Prevents creditors from attempting to collect a debt that has been discharged in bankruptcy
  - ▶ Creditors who violate the injunction may be subject to sanctions

## CHAPTER 13 – CONSUMER REORGANIZATION

- ▶ When a client has an excess of income, they may qualify for a Chapter 13
- ▶ Repays creditors a percentage based on the debtor's income over a period of 3-5 years in monthly installments – this is called a plan
- ▶ An order of relief is entered by the court once the petition and schedules are filed
- ▶ The plan must be filed with the petition or within 14 days of the petition or the case will be dismissed
- ▶ May be used to prevent foreclosure of debtor's real property by paying the arrears through the plan

# CHAPTER 13 – CONSUMER REORGANIZATION

## THE STANDING TRUSTEE

- ▶ The standing trustee in Connecticut is Roberta Napolitano
- ▶ The trustee's job is to make sure plans are feasible and oversee the administration of the case, including ensuring timely payments from the debtor and making distributions to creditors
- ▶ Pursuant to 11 U.S.C. § 1326(a)(1), payments under the plan must begin the earlier of 30 days after the case or a plan is filed
- ▶ A debtor must complete their plan to receive a discharge of any remaining debt, if any
- ▶ A case may be dismissed or converted for a variety of issues

## SUBCHAPTER V – SMALL BUSINESS REORGANIZATION

- ▶ Streamlined mini Chapter 11 designed to be less expensive and move more quickly
- ▶ Debtors must elect Subchapter V on the petition
- ▶ 11 U.S.C. § 1187(a) states what financial documents for the business must be included with the petition
- ▶ A debtor must file statements and schedules, and if an individual a Statement of Current Monthly Income, within 14 days of the petition date
- ▶ A status conference will be held within 60 days of the petition date
  - ▶ 14 days prior to this conference, a debtor must file and serve a report detailing the debtor's current and proposed efforts to obtain a consensual plan
- ▶ A plan must be filed within 90 days of the petition date
  - ▶ Consensual or Cramdown?
- ▶ Debtor-in-possession operates business, must file monthly operating reports and make payments according to plan

## SUBCHAPTER V – SMALL BUSINESS REORGANIZATION

### THE ROLE OF THE TRUSTEE

- ▶ The “consulting” trustee facilitates the development of a consensual plan of reorganization (11 U.S.C. § 1183(b)(7))
- ▶ Attends the Initial Debtor Conference (within 10 days of petition date) and Section 341 Meeting of Creditors (within 40 days of petition date) held by the United States Trustee
- ▶ Makes sure the debtor makes timely plan payments
- ▶ Works with the UST to oversee administration
- ▶ Operates the business if the debtor stops being a debtor-in-possession
- ▶ Confirmation of a consensual plan terminates the trustee’s appointment, but confirmation of a non-consensual plan means the trustee continues to administer the case

# ALTERNATIVES TO BANKRUPTCY

- ▶ Debt workout
  - ▶ Negotiating with creditors on client's behalf to come to a reasonable settlement
  - ▶ Debtor must have pool of money to fund settlements – can they liquidate assets?
  - ▶ Has tax implications
- ▶ Mortgage modification
  - ▶ Allows client to pay back arrears through restructured mortgage
- ▶ Short sale
  - ▶ Agreement with mortgage lender to sell the property
- ▶ Dissolution of business
- ▶ The “judgment proof” client

QUESTIONS?

## SUBCHAPTER V OF CHAPTER 11

### Eligibility

- Must fit the “small business debtor” definition of 11 U.S.C. § 101(51D)
  - “person [individual or entity] engaged in commercial or business activities”
  - total noncontingent, liquidated debt of \$2,727,625 or less (the CARES Act extended the debt limit to \$7,500,000)
  - at least 50% of debt must have arisen from commercial or business activities
  - no single asset real estate debtors

### Big Takeaways/Key Differences

- Debtors must affirmatively elect Subchapter V treatment or the existing provisions of chapter 11 that govern small business cases continue to apply
- No creditors committee appointed, unless the court orders otherwise
- Subchapter V Trustee appointed by UST in every case
  - intended to help facilitate the creation & consummation of a consensual plan
- Debtors do not pay quarterly UST fees, but must pay the Subchapter V Trustee their approved fees
- Only the debtor may file a subchapter V plan – plan must be filed within 90 days of the petition date, unless the court extends that deadline for circumstances determined to be outside of the debtor’s control
- No disclosure statement required, unless the court orders otherwise, but plan must include
  - brief history of the business operations of debtor
  - liquidation analysis
  - financial projections with respect to the ability of debtor to make payments under the proposed plan
- No deadline to confirm a plan (unlike small business cases)
- Individual debtors may cramdown a mortgage on their principal residence if the loan proceeds were used “primarily in connection with the small business of the debtor” and not to purchase the residence
- Subchapter V eliminates the Absolute Priority Rule and new value exception
- Debtor’s counsel can have pre-petition claim of less than \$10,000 and still be disinterested
- Consensual Confirmation: plan meets all requirements of section 1129(a) (except subparagraph (a)(15) [disposable income definition])
  - Admin claims are paid on effective date or otherwise by agreement

- o Discharge upon confirmation
  - o Sub V Trustee's services terminated upon substantial consummation of plan (generally when payments commence)
- Non-consensual/cramdown confirmation: cramdown plan may be confirmed under section 1191(b) if all requirements of 1129(a) are met – other than paragraphs 8 (requiring acceptance by each class), 10 (requiring acceptance by at least one impaired non-insider class) and 15 – so long as the plan does not discriminate unfairly and is “fair and equitable”
  - o Sub V Trustee remains in place and makes payments to creditors for the life of the plan
  - o Property of the estate includes post-petition earnings
  - o Admin claims may be paid over the life of the plan
  - o Debtor receives discharge upon completion of all payments due within first 3 years of plan